STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2014
v	No. 308654 Kent Circuit Court
MELVIN JAMES MARSHALL, Defendant-Appellant.	LC No. 11-007667-FC

ON REMAND

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In *People v Melvin James Marshall*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2013 (Docket No. 308654), this Court affirmed defendant's convictions and sentences for two counts of armed robbery, MCL 750.529, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (second offense), MCL 750.227b. This Court held: that (1) by failing to object, defendant waived his claim that the prosecutor impermissibly used a preemptory challenge to excuse a jury venire member on the basis of race in violation of *Batson v Kentucky*, 476 US79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); (2) regardless, no *Baston* violation occurred and, accordingly, defendant could not establish ineffective assistance of counsel; (3) the trial court did not err in scoring Offense Variable (OV) 13 at 25 points because a scoring decision will be upheld when there is "any evidence" to support it; (4) although OV 12 was not scored, it should have been scored at 10 points but, since the sentencing range was not affected, resentencing was not required; and (5) "[t]here was adequate evidence in support of the trial court's finding that defendant acted as a leader for purposes of scoring OV 14". *Marshall*, unpub op at 5. In an order issued on April 1, 2014, the Supreme Court vacated this Court's opinion in part, concluding that this Court had employed the wrong standard of review in addressing issues pertaining to the scoring of the sentencing guidelines. It remanded the case for reconsideration of this Court's review of the scoring of sentencing variables in light of *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), and *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), cert den 555 US 1015 (2008). On remand, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The basic facts of this case are set forth in our previous opinion.

On August 1, 2011, Grace Eyk-Lang and Stephen Plachta were approached in the parking lot of their apartment building by defendant and two other individuals (Eric Scott, and Deontae Woodhouse) who exited a tan Chevy Malibu. Scott held a handgun to Plachta's head and demanded money. Plachta said that he had none, and either the man with the gun, or one of his two companions, reached into Plachta's pockets, took his wallet and cellular telephone, and handed these items off to the third group member. Scott then pointed the gun at Eyk-Lang, and she handed over her purse. Defendant and the other two men left the apartment parking lot. Plachta observed the Malibu's license place. The license plate number was provided to police who found that the Malibu was registered to defendant at 1025 Lilac Court. The officers subsequently observed the tan Chevy Malibu parked in the back yard of that home with its dome light still illuminated. Shortly thereafter, officers using a public address system commanded the occupants of the house to come out. Within 10 to 15 minutes, Woodhouse and a child exited the house via the front door, and Scott was apprehended outside the rear of the house after breaking a window. Defendant, however, refused to exit the house for approximately one hour despite repeated commands to surrender.

After he eventually surrendered, defendant consented to a search of the home, and Eyk-Lang and Plachta's property was found in different places throughout the home. Plachta and Eyk-Lang each expressed complete confidence that Scott was one of the men who robbed them. They were less certain about the other two. Eyk-Lang testified, however, that she saw defendant driving the Malibu. Scott indicated that he, defendant, and Woodhouse, had mutually planned to commit the robbery and share in any proceeds. While Scott pointed the gun at Plachta during the robbery, defendant drove the men to the robbery in his Malibu, and ultimately took control of the gun after the robbery was complete. [*Marshall*, unpub op at 1-2.]

II. STANDARD OF REVIEW

Determining whether a trial court properly scored sentencing variables is a two-step process. First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made. See *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257 (2012). Second, the appellate court considers de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . ." *Hardy*, 494 Mich at 438. [*People v Melvin James Marshall*, 495 Mich 983; 843 NW2d 925 (2014).]

III. OV 13

MCL 777.43(1)(c) provides in pertinent part that 25 points are to be scored for OV 13 if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." The crimes need not result in a conviction but must be within a five-year period, including the sentencing offense. MCL 777.43(2)(a). Defendant argues that OV 13 was improperly scored because he did not have three eligible convictions within five years of the offense. Below, defendant did not dispute that the two armed robbery convictions should be

counted, but asserted only that his conduct at the time of arrest did not amount to resisting or obstructing. On appeal, he argues that there were "no scorable felony convictions within five years." To the extent defendant is contesting use of the two armed robbery convictions for scoring purposes, the issue is not preserved. However, MCL 777.43 does not allow for a score if there have been only two offenses. Thus, the trial court had to find that a third offense had been committed in order to justify the score given.

In the present case, the trial court found that resisting or obstructing had occurred because "the disobedience" of "simply not coming out [of the house and causing a standoff for a couple of hours . . . constitutes a defiance of a police order, which is tantamount to the same thing [as resisting and obstructing], and I think would be chargeable under the offense." In our previous opinion, this Court discussed the facts in support of the trial court's conclusion as follows:

> The license plate number [of the Malibu used during the armed robbery] was provided to police who found that the Malibu was registered to defendant at 1025 Lilac Court. The officers subsequently observed the tan Chevy Malibu parked in the back yard of that home with its dome light still illuminated. Shortly thereafter, officers using a public address system commanded the occupants of the house to come out. Within 10 to 15 minutes, Woodhouse [an accomplice] and a child exited the house via the front door, and Scott [a second accomplice] was apprehended outside the rear of the house after breaking a window. Defendant, however, refused to exit the house for approximately one hour despite repeated commands to surrender. [*Marshall*, unpub op at 1.]

Although this Court stated that it would "uphold a scoring decision when the record contains *any evidence* in support," *id.*, unpub op at 4 (emphasis added), a standard inconsistent with *Hardy*, we also concluded that the trial court's finding was supported by a preponderance of the evidence, consistent with *Hardy*:

> The testimony showed that the police used a public address system to command everyone inside 1025 Lilac to come out of the house, and the other three people in the house exited in short order, with only defendant remaining inside. A defendant knows or has reason to know a police officer is acting in the performance of his duties when the officer is in full uniform with a marked patrol vehicle. *People v Nichols*, 262 Mich App 408, 413; 686 NW2d 502 (2004). Thus, the trial court could conclude that defendant knew or had reason to know he was failing to comply with the loudly declared order of a police officer performing his duties. Since "obstruct" includes the "knowing failure to comply with a lawful command," MCL 750.81d(7)(a), and in light of the exigent circumstances exception, *the preponderance of the evidence supports that defendant resisted or obstructed a police officer* in violation of MCL 750.81d(1). [Unpub op at 4 (citation omitted; emphasis added).]

Given the facts on the record and the existence of the two armed robbery convictions, the trial court's findings were "adequate to satisfy the scoring conditions prescribed by statute," *Hardy*, 494 Mich at 438, and we therefore uphold the score of 25 points for OV 13.

IV. OV 14

MCL 777.44(1)(a) provides that OV 14 is to be scored at 10 points if the offender was a leader in a multiple offender situation. More than one offender can be a leader and the entire criminal transaction must be considered. MCL 777.44(2). The trial court found indications that defendant had a leadership role based on the fact that his vehicle was used, all three perpetrators went to his house immediately after the crime was committed, and the fruits of the crime were found in his house. The court stated: "And while criminal conspiracies rarely function on a democratic model where we have elections with recorded votes, I think that it would be reasonable for [defendant] to be elected leader, were such a procedure to be followed."

In upholding the trial court's finding, this Court also pointed to testimony establishing that defendant was the driver and that he took control of the gun after the armed robberies. *Marshall*, unpub op at 5. This Court stated that this evidence was "adequate" to support the trial court's finding. (*Id.*) The question is whether this finding is supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary*, (9th ed). We conclude that the cited evidence indicating that defendant was more in control of the situation than the other perpetrators constituted a preponderance of the evidence and thus the trial court did not clearly err in finding that he was a leader for purposes of scoring OV 14.

Affirmed.[1]

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

[1] In our original opinion, we opined that the trial court should have scored OV 12 for contemporaneous felonious criminal acts against a person. The basis for scoring OV 12 was the trial court's factual finding, in conjunction with scoring OV 13, that defendant resisted or obstructed. Again, this finding is supported by a preponderance of the evidence and is not clearly erroneous. The determination that OV 12 should have been scored based on this finding was an application of the facts to the law, which *Hardy* indicates is subject to de novo review. *Hardy*, 494 Mich at 438. Thus, our previous statement regarding the scoring of OV 12 is unaffected by applying the standard of review as set forth in *Hardy*. However, as we stated previously, defendant's sentencing range would not be affected by scoring OV 12; resentencing on this issue is therefore not required. See *People v Sims*, 489 Mich 970, 970; 798 NW2d 796 (2011), mod on other grounds 490 Mich 857 (2011), citing *People v Francisco*, 474 Mich 82, 90 n 8; 71 NW2d 44 (2006).